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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-301

GEORGE W. LEWIS, *et al.*,

Petitioners,

—v.—

WILLIAM F. HYLAND, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. Respondents contend that even if plaintiffs "had demonstrated causal responsibility "for a pervasive pattern of unconstitutional conduct on the part of the responsible state police officials, it would be "inappropriate" for a federal court to direct equitable relief against their successors in office (Brief in Opposition, p. 10).

Respondents' reliance on Mayor v. Educational Equality League, 415 US 605 (1974), to support their contention that the injunctive relief sought here is no longer applicable with respect to the present Attorney General and Superintendent of Police, is misplaced. In that case, plaintiffs' allegations of discrimination in appointments to the School Board Nominating Panel were directed against Mayor Tate personally. There, plaintiffs were not challenging the system under which appointments were made nor were they challenging the validity of the qualifications for nominations as set

forth in the Philadelphia City Charter. Citing statements attributed to Mayor Tate, the thrust of their complaint was that appointments to the Nominating Panel reflected the Mayor's individual biases against blacks. Because the charges were so specifically addressed to the personal attitudes of the former Mayor, the Court found no need to enjoin the new Mayor's appointment practices. Further support for this interpretation of the Court's decision in Mayor is found in the fact that the Court cited Spomer v. Littleton, 414 U.S. 514 (1974) immediately following the portion of its opinion relied on by Respondents.

There were no "allegations" in Spomer, as there were here, that the successors intended "to continue" the practices of their predecessors (414 U.S. at 521). Furthermore:

> The wrongful conduct charged in the complaint is personal to Berbling despite the fact that he was also sued in his then capacity as State's Attorney. No charge is

> made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged...414 U.S. at 521 (emphasis added; footnote deleted).

In Garrett v. City of Hamtramck, 394 F. Supp. 1151 (E.D. Mich. 1975), a class action charging federal and municipal officials with carrying out discriminatory housing policies, the lower court, cognizant of the Mayor decision, tersely disposed of the same argument raised now by Respondents:

> [The defendants] introduced the additional specious argument that present officials of Hamtramck could not be joined to this suit absent a showing that they have discriminated against the plaintiffs. Mayor v. Educational Equality League, 415 U.S. 605 (1974).
>
> This Court has no intentions to have this matter relitigated... . The joinder of the present municipal officials is necessary, if at all, only to implement this Court's Order. The municipal defendants' argument that present discrimination must be proved against these persons is wholly without merit, and is part of a pattern of delay

and obfuscation which has marked the proceedings herein over the life of this litigation. To accept the defendants argument would ignore the discrimination proved by the plaintiffs. 394 F. Supp. at 1153.

See also Patterson v. MacDougall, 506 F. 2d 1, 6 n. 5 (5th Cir. 1975):

> In Spomer, the wrongs alleged were personal to the defendant, and there was no showing that his office or staff was implicated in the alleged wrongdoing. Here, on the contrary, the wrongdoing is alleged to permeate many levels of prison personnel, and, if proved, would likely require relief to correct institutionalized abuses.

If Respondents are contending that the record is too stale to support an injunction, it should be pointed out that there have been repeated stipulations between the parties, implemented by specific court orders, that plaintiffs' allegations and right to relief would be judged on the basis of the completed testimony already in the record. Under those stipulations and orders,

plaintiffs were not permitted to produce more current evidence of the continuing practice, although they were prepared and able to do so. See Order of Judge Kitchen of September 13, 1973; letter of Judge Cohen to Mr. Zauber, attorney for defendants ,of November 19, 1973; Zauber letter of November 14, 1973; letter of Frank Askin to Judge Cohen of November 21, 1973; and transcript of hearing before Judge Meanor on October 29, 1974, p. 2. At that October 29th hearing, Respondents objected to the suggestion made by plaintiffs that the State Police begin keeping records of vehicle searches taking place on the state's highways in the event the trial court might wish to take additional testimony. (Tr., 10/29/74, p. 13). It thus comes with little grace and with less legal justification for Respondents now to suggest the record evidence is too old to support injunctive relief.

Plaintiffs produced sufficient proof to establish a pattern and practice of illegal searches. If the mere passage of time between proof and decision would justify an inference that the pattern and practice had been discontinued, any claim for injunctive relief could readily be destroyed by judicial inactivity. Cf. Allee v. Medrano, 416 U.S. 802,810 (1974).

The burden was on Respondents to establish that the pattern and practice of illegal searches shown by the plaintiffs had ceased and was not likely to be resumed. They failed to meet that burden. As noted, Respondents agreed that this protracted controversy should be decided on the existing record. As Judge Meanor found, based on that record, plaintiffs proved a large number of unconstitutional civil rights violations by State Troopers, practiced against a specific subclass of highway travellers and motivated by the atypical appearance of members of that subclass. In response to plaintiffs' evidence, Respondents produced absolutely

nothing to establish that the pattern and practice had been discontinued and would not be resumed. Absent such proof, and given their stipulation, Respondents cannot now contend that the evidence in the record is too old to support injunctive relief.[1]

II. Respondents misrepresent the record when they claim that the district court merely found 34 instances of illegal searches. The district court also found that those 34 instances were merely illustrative of defendants' practices, and that only "a relatively small number of those whose rights were violated were represented before the court." 47a.

III. Respondents oppose the petition on the ground that this Court ought not set aside findings of fact endorsed

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1 See also Petition for Certiorari, pp. 8-9, n. 6, noting plaintiffs' offer of proof to the trial court concerning the continuing police practice.

by two lower courts. Petitioners do not ask this Court to set aside any findings of fact. If certiorari is granted, petitioners will seek a remand to the Court of Appeals to reconsider plaintiffs' appeal under a proper legal standard. Because of the Circuit's misapplication of Goode v. Rizzo it has not yet properly reviewed the findings and conclusions of the trial court. Plaintiffs request only that this Court order such review under a proper legal standard.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

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